# SUPREME COURT STRIKES DOWN BAN ON SPORTS WAGERING

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**U.S. Betting & Gaming Alert**

On May 14, 2018, the U.S. Supreme Court issued a decision that struck down the Professional and Amateur Sports Protection Act ("PASPA") on grounds that the act unconstitutionally "commandeers" the powers of the states. By rejecting PASPA, the Supreme Court opened the door for states to authorize sports wagering within their respective borders. This likely will prompt a large number of states to move forward with plans to allow for land-based sports wagering. A recent study estimated that as many as 32 states could authorize sports wagering within the next five years. [1] Because of prohibitions that the Federal Wire Act imposes, however, it is uncertain whether states may authorize "intra-state" online sports wagering.

## BACKGROUND

PASPA was signed into law by President George H.W. Bush in 1992 and went into effect in January 1993. PASPA did not make sports wagering a federal infraction; instead, it banned states from sponsoring, authorizing, operating, or regulating sports wagering. The law contained "grandfather" provisions that allowed existing forms of state-authorized sports wagering to continue in four states: Nevada (the only state with widespread state-sponsored sports wagering when the bill became law) and three other states with more limited sports wagering (Oregon, Delaware, and Montana). PASPA covers land-based and online sports wagering.

In 2014, the New Jersey Legislature enacted a law that repealed state-law provisions that prohibited sporting wagering at horseracing tracks and casinos in Atlantic City but left the prohibitions in place elsewhere. The statute did not expressly authorize sports wagering to occur anywhere. The National Collegiate Athletic Association and major professional sports leagues brought an action in federal court seeking to enjoin the law on grounds that it violates PASPA. A federal appeals court concluded that, in violation of PASPA, the New Jersey statute "authorize[s]" sports wagering "by law" because it "selectively grants permission to certain entities to engage in sports gambling." It also concluded that PASPA does not violate the U.S. Constitution. It therefore affirmed a federal trial court's decision to invalidate the New Jersey statute.

## SUPREME COURT DECISION

In reviewing the appeals court's decision, the Supreme Court considered whether, by forcing states to maintain state-law bans on sports wagering, PASPA "commandeers the regulatory power of states," in violation of the Tenth Amendment to the U.S. Constitution. Under the Tenth Amendment, all legislative power that the U.S. Constitution does not confer on Congress is reserved for the states. Congress's enumerated powers do not include the power to issue direct orders to the governments of the states regarding the enactment of laws, including laws that authorize or prohibit sports wagering. The Supreme Court held that PASPA's provision that

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prohibits states from authorizing sports wagering violates the anti-commandeering rule. It therefore ruled that PASPA is unconstitutional. By striking down PASPA, the Supreme Court opened the door for states to offer sports wagering within their borders.

## IMPACT OF DECISION

The Supreme Court decision reinvigorates the New Jersey statute, removing prohibitions on sports wagering at the state's casinos and racetracks. Horseracing tracks and casinos in New Jersey are now poised to offer sports wagering in the near future. Delaware, one of the four states whose laws were "grandfathered" under PASPA, is also well positioned to move forward quickly with sports wagering. In fact, Delaware's governor predicted that "full-scale sports gaming could be available at Delaware's casinos before the end of June." [2]

The decision will also lead to state-sanctioned sports wagering in other jurisdictions. As one example, Pennsylvania's Act 42 of 2017 establishes a comprehensive regulatory regime for sports wagering and provides that the regime will go into effect if, and when, "federal law is enacted or repealed or a federal court decision is filed that permits a state to regulate sports wagering." The decision at hand is one that, by its terms, "permits a state to regulate sports wagering."

Notably, despite the Supreme Court's decision to strike down PASPA, the Wire Act imposes separate prohibitions that make it unclear whether states may authorize "intra-state" *online* sports wagering.

The Wire Act prohibits any entity that is in the business of betting or wagering from knowingly using "a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest[.]" Although this statute is ambiguous in certain respects, there is not much dispute that, regardless of any state law to the contrary, it prevents a gaming operator from knowingly receiving, in "interstate or foreign commerce," an online wager from a U.S.-based person who is staking it on the opportunity to win a prize based on the outcome of a sporting event. [3]

Given the Supreme Court's decision, a state might take the position that, notwithstanding the Wire Act, it may authorize online sports wagering as long as the online wagering transmissions begin and end within its borders. Those transmissions, the state might argue, are not in "interstate or foreign commerce" and, consequently, do not trigger the Wire Act. However, while certain courts have concluded that a transmission between persons in the same state is presumed to be an intra-state transmission, others have rejected this notion and instead concluded that a transmission moves in "interstate commerce" if it begins in one state, passes through another, and then ends in the first, which is the case with many Internet transmissions. Also, at several points over the years, the U.S. Department of Justice — which enforces the Wire Act — has expressly agreed with this view.

It therefore remains to be seen whether and to what extent, in light of the Supreme Court's decision, states may authorize "intra-state" online sports wagering. This issue may be another one that is headed for the courts.

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**Notes:**

[1] Study by Eilers & Krejcik Gaming, an entity that tracks state-by-state gambling legislation, *see Sports betting could spread to 32 U.S. states*, AP (Oct. 2, 2017), https://www.cbsnews.com/news/sports-betting-could-spread-to-32-u-s-states/.

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[2] *See* Dave Huges, *Supreme Court ruling may pave the way for full-scale sports betting in Delaware*, Delaware State News (May 14, 2018), https://delawarestatenews.net/news/supreme-court-ruling-may-pave-the-way-for-full-scale-sports-betting-in-delaware/.
[3] There is one recognized "exception" to the Wire Act. It is well accepted that, if a gaming operator knowingly receives online *horseracing wagers* from U.S.-based persons and does so in compliance with the Federal Interstate Horseracing Act, it does not violate the Wire Act or any other federal statute.

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